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REDACTED - FOR PUBLIC INSPECTION

April 29, 2010

VIA COURIER

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW, Room TW-A325
Washington, DC 20554

Re: ***Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, WC Dkt. No. 09-135**

Dear Ms. Dortch:

Please find enclosed for filing in the above-referenced proceeding two copies of the redacted version of the Comments of Integra Telecom, Inc., tw telecom inc., Cbeyond, Inc., and One Communications Corp. Pursuant to the April 15, 2009 Public Notice in this proceeding,[1] electronic copies of the redacted version of the filing will be sent to the Competition Policy Division of the Wireline Competition Bureau and Best Copy and Printing, Inc.

Pursuant to the *Second Protective Order* in the above-referenced proceeding,[2] one original of the highly confidential version of this filing is being filed with the Secretary's Office under separate cover today. Also pursuant to the *Second Protective Order*, two copies of highly confidential version will be provided to Gary Remondino of the Wireline Competition Bureau and electronic copies of the highly confidential version will be sent to Tim Stelzig and Denise Coca of the Wireline Competition Bureau.

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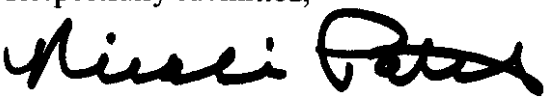
[1] *See Request for Additional Comment and Data Related to Qwest Corporation's Petition for Forbearance From Certain Network Element and Other Obligations in the Phoenix, Arizona MSA*, WC Dkt. No. 09-135, DA 10-647, at 2 (rel. Apr. 15, 2010) ("All other filing requirements set forth in the Public Notice establishing the initial pleading cycle remain in effect.").

[2] *See Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, Second Protective Order, WC Dkt. No. 09-135, DA 09-1670 (WCB, rel. July 29, 2009) ("*Second Protective Order*").

Please do not hesitate to contact me if you have any questions or concerns about this submission.

Respectfully submitted,



Thomas Jones
Nirali Patel

Counsel for Integra Telecom, Inc., tw telecom inc., Cbeyond, Inc., and One Communications Corp.

Enclosures

REDACTED - FOR PUBLIC INSPECTION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
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	)	
Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area	)	WC Docket No. 09-135
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COMMENTS OF INTEGRA TELECOM, INC., TW TELECOM INC., CBEYOND, INC., AND ONE COMMUNICATIONS CORP.

WILLKIE FARR & GALLAGHER LLP
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April 29, 2010

TABLE OF CONTENTS

Page

I. WHEN EVALUATING QWEST'S PETITION FOR FORBEARANCE FROM UNBUNDLING OBLIGATIONS IN THE PHOENIX MSA, THE COMMISSION SHOULD APPLY A STANDARD OF REVIEW BASED ON SOUND PRINCIPLES OF COMPETITION POLICY. 1

II. REGARDLESS OF THE STANDARD APPLIED, THE MOST RECENT INFORMATION AVAILABLE TO THE JOINT COMMENTERS CONFIRMS THAT QWEST'S PETITION FOR FORBEARANCE FROM UNBUNDLING OBLIGATIONS IN THE PHOENIX MSA SHOULD BE DENIED 5

III. CONCLUSION 8

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
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Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area	)	WC Docket No. 09-135
	)	
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COMMENTS OF INTEGRA TELECOM, INC., TW TELECOM INC., CBEYOND, INC., AND ONE COMMUNICATIONS CORP.

Integra Telecom, Inc. ("Integra"), tw telecom inc. ("tw telecom"), Cbeyond, Inc. ("Cbeyond"), and One Communications Corp. ("One Communications") (collectively, the "Joint Commenters"), through their undersigned counsel, hereby submit these comments in response to the April 15, 2010 Public Notice[1] in the above-captioned proceeding.

I. WHEN EVALUATING QWEST'S PETITION FOR FORBEARANCE FROM UNBUNDLING OBLIGATIONS IN THE PHOENIX MSA, THE COMMISSION SHOULD APPLY A STANDARD OF REVIEW BASED ON SOUND PRINCIPLES OF COMPETITION POLICY.

The April 15, 2010 Public Notice seeks comment on "whether, in considering Qwest's Phoenix MSA Petition, [the Commission] should apply a market power-oriented approach along the lines suggested in the FTC-DOJ Horizontal Merger Guidelines."[2] As the Joint Commenters

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[1] *See Request For Additional Comment And Data Related To Qwest Corporation's Petition For Forbearance From Certain Network Element And Other Obligations In The Phoenix, Arizona MSA*, Public Notice, WC Dkt. No. 09-135, DA 10-647 (rel. Apr. 15, 2010) ("April 15, 2010 Public Notice").

[2] *Id.* at 2.

have advocated in their opposition in this proceeding[3] and in their comments on the remands of the *6-MSA Order* and the *4-MSA Order*,[4] when evaluating petitions for forbearance from unbundling requirements, the Commission should: (1) define the relevant product markets based on customer demand patterns;[5] (2) define the relevant geographic market as a Metropolitan Statistical Area ("MSA");[6] and (3) assess the level of competition in each relevant market using

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[3] *See generally* Opposition of Integra Telecom, Inc., tw telecom inc., Cbeyond, Inc., and One Communications Corp., WC Dkt. No. 09-135 (filed Sept. 21, 2009) ("Joint Commenters' Opposition").

[4] *See generally* Comments of Cbeyond, Integra, One Communications and tw telecom, WC Dkt. Nos. 06-172 & 07-97 (filed Sept. 21, 2009) ("Remand Comments") (attached hereto as Attachment A).

[5] *See* Joint Commenters' Opposition at 7-8 (explaining that, at a minimum, the Commission should differentiate the residential market from the business market and the retail market from the wholesale market); *see also* Remand Comments at 16 (explaining that the demand characteristics of retail and wholesale markets are entirely different); *id.* at 10-15 (explaining that the Commission should define the relevant product markets by applying the "hypothetical monopolist" test under the FTC-DOJ Horizontal Merger Guidelines, and where the Commission lacks the necessary pricing information to apply this test, it should review other evidence that bears on whether a price increase would be profitable, such as the prices and characteristics of the services and whether a company's own marketing and advertising materials and strategies reflect its views as to the extent to which customers view products as substitutes). It should be noted that while the recently proposed Revised Merger Guidelines state that "[t]he Agencies' analysis need not start with market definition," they acknowledge that "evaluation of competitive alternatives available to customers is always necessary at some point in the analysis." *See* Revised FTC-DOJ Horizontal Merger Guidelines, at 7 (rel. Apr. 20, 2010), *available at* http://www.ftc.gov/os/2010/04/100420hmg.pdf ("Revised Merger Guidelines"). Moreover, under the Revised Merger Guidelines, the Agencies continue to employ the hypothetical monopolist test to define product markets. *See id.* at 9-12.

[6] *See* Joint Commenters' Opposition at 8-9 (explaining that the Commission should assess competition on an MSA basis because competitors that rely on UNEs must obtain access to those facilities throughout an MSA in order to achieve profitability and serve a community of interest); *see also* "Factual and Legal Support for Competitors' Proposed UNE Forbearance Standard," at 9-11, *attached to* Letter from Thomas Jones, Counsel for One Communications Corp. et al., to Marlene H. Dortch, Secretary, FCC, WC Dkt. Nos. 08-24 & 08-49 (filed Apr. 14, 2009) ("Joint Commenters' April 14, 2009 UNE Forbearance Ex Parte Letter") (attached hereto as Attachment B) (explaining that CLECs that purchase wholesale inputs to provide downstream retail services can generally achieve minimum efficient scale only if they serve geographic areas that are

either the standard proposed by a coalition of competitors in related forbearance proceedings (the "Competitors' Proposed Standard") or a market competition standard based on the FTC-DOJ Horizontal Merger Guidelines (a "Market Competition Standard").[7]

In assessing competition under the Competitors' Proposed Standard, the Commission should determine, for each MSA in which forbearance is sought, whether:

> (1) there are at least two facilities-based non-ILEC wireline competitors in the wholesale loop market, each of which has actually deployed end-user connections to 75 percent of end-user locations, each of which has deployed wholesale operations support systems sufficient to support the wholesale demand in the relevant product market, and each of which has garnered at least 15 percent of wholesale loop market share in the relevant product market ("Wholesale Test");
>
> or
>
> (2) at least 75 percent of end-user locations are served by two or more facilities-based non-ILEC wireline competitors that offer retail service in the relevant downstream product market to the locations in question via loops that the competitors have actually deployed, and there are at least two facilities-based competitors to the ILEC that have each garnered at least 15 percent of retail market share in the relevant product market ("Retail Test").[8]

The Competitors' Proposed Standard could be applied as a presumption test under which an MSA that meets the criteria would be presumed to be eligible for forbearance and an MSA that does not meet the criteria would be presumed to be ineligible for forbearance.[9]

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approximately the size of an MSA). For example, Integra has determined that it must be able to serve the small and medium-sized businesses throughout the Phoenix MSA in order to reach and sustain overall profitability. *See* Joint Commenters' Opposition, Attachment A, Cantrall Declaration ¶¶ 4-5.

[7] *See* Joint Commenters' Opposition at 9-11.

[8] The Commission should establish clear criteria for identifying the firms that should be "counted" as competitors under the Competitors' Proposed Standard. *See* Joint Commenters' April 14, 2009 UNE Forbearance Ex Parte Letter at 16-18.

[9] The requirement under the Competitors' Proposed Standard that at least two facilities-based wireline competitors to the incumbent LEC, each of which has a 15 percent market share in the

Under a Market Competition Standard, forbearance would be granted in the relevant product market in an MSA only where facilities-based competition is sufficient to prevent the incumbent LEC from exercising market power unilaterally or as a result of coordinated conduct.[10] Pursuant to the FTC-DOJ Horizontal Merger Guidelines, potential entry should be considered in the Commission's analysis only if such entry is "timely, likely, and sufficient."[11] Because it is extremely unlikely that the Commission could conclude that a prospective entrant into the markets at issue in UNE forbearance proceedings meets these criteria, the Commission should presume that only actual competition is relevant.[12] In assessing actual competition, the

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relevant product market, must be present before forbearance can be granted is economically sound. *First*, both economic theory and the available empirical evidence indicate that more than one viable competitor to the incumbent is usually required to prevent the harms to consumer welfare, namely supra-competitive prices, resulting from duopoly markets. *See generally* Declaration of Dr. Stanley M. Besen (dated Apr. 22, 2009), *attached to* Letter from Andrew D. Lipman, Counsel for TDS Metrocom, LLC et al. & Thomas Jones, Counsel for Cbeyond, Inc. et al., to Marlene H. Dortch, Secretary, FCC, WC Dkt. Nos. 08-24 & 08-49 (filed Apr. 23, 2009) (attached hereto as Attachment C). *Second*, empirical evidence suggests that while the presence of a third "substantial" firm would reduce the otherwise high price-cost margins of the two leading firms in a duopoly market, "a third firm with only a small market share might have little effect." *See id.* at 8; *see also id.* at 14 (concluding that "without further analysis, one should not be too quick to count fringe or differentiated players as being fully equivalent to major direct competitors").

[10] *See* Remand Comments at 27 (explaining that there must be sufficient facilities-based competition that the incumbent cannot, either through unilateral conduct or tacit collusion, charge prices that significantly exceed a fair measure of cost, degrade service quality, or slow-roll innovation).

[11] *See* FTC-DOJ Horizontal Merger Guidelines §§ 3.0-3.4 & Revised Merger Guidelines at 27-29; *see also* Remand Comments at 20-21. Although the Revised Merger Guidelines have eliminated the presumption that entry will be considered timely only if it can be achieved within two years, the analysis under the Revised Merger Guidelines remains focused on the timeliness, likelihood, and sufficiency of entry. *See* Revised Merger Guidelines at 27-29.

[12] *See* Remand Comments at 21-26 (explaining that, given the characteristics of the telecommunications markets at issue in UNE forbearance proceedings, future entry will almost certainly not be "timely," is not "likely," and will not be "sufficient").

Commission should require that (1) the incumbent LEC faces competition from at least two competitors that utilize their own loop facilities to provide service throughout the MSA, and (2) there are at least two competitors with their own loop facilities that have garnered substantial market share (e.g., 15 percent).[13]

II. REGARDLESS OF THE STANDARD APPLIED, THE MOST RECENT INFORMATION AVAILABLE TO THE JOINT COMMENTERS CONFIRMS THAT QWEST'S PETITION FOR FORBEARANCE FROM UNBUNDLING OBLIGATIONS IN THE PHOENIX MSA SHOULD BE DENIED.

The April 15, 2010 Public Notice seeks comment on "whether the record evidence supports granting forbearance in this proceeding" and invites "interested persons to cite specific evidence in the record or provide new data as needed to support their pleadings."[14] In their April 28, 2010 Ex Parte Filing in this proceeding, the Joint Commenters explained that, regardless of the standard of review applied, the record evidence shows that Qwest's petition for forbearance from unbundling obligations in the Phoenix MSA should be denied.[15] As the Joint Commenters discussed in detail, data submitted in the record by the Arizona Corporation Commission ("ACC") confirms that Qwest faces insufficient facilities-based competition in both the retail business and wholesale markets in the Phoenix MSA to justify forbearance.[16] Moreover, as

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[13] *See id.* at 27-31; *see also supra* note 9.

[14] April 15, 2010 Public Notice at 2.

[15] *See* "Integra Telecom, tw telecom, Cbeyond, and One Communications Presentation Regarding Qwest Phoenix MSA Forbearance Petition, WC Dkt. No. 09-135, April 27, 2010" at 2-7, *attached to* Letter from Thomas Jones, Counsel for Integra Telecom, Inc. et al., to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 09-135 (filed Apr. 28, 2010) ("Joint Commenters' April 28, 2010 Ex Parte Filing").

[16] *See id.* at 2 (explaining that the ACC's data confirms that Qwest, not Cox, dominates the business market in the Phoenix MSA); *id.* at 5-6 (explaining that the ACC's data confirms the lack of intramodal, facilities-based competition in the business market in the Phoenix MSA); *id.*

discussed below, the most recent information available to the Joint Commenters confirms that Qwest's petition should be denied.

First, Integra's most recent cable churn data confirms that most of the competition that Integra faces in the retail business market comes from Qwest, not Cox. Specifically, between August 2009 and March 2010, Integra ported out numbers **[***BEGIN HIGHLY CONFIDENTIAL**\]**

[*END HIGHLY CONFIDENTIAL**\]** Stated differently, Integra ported out numbers **[***BEGIN HIGHLY CONFIDENTIAL**\]** **[***END HIGHLY CONFIDENTIAL**\]** to Qwest than to Cox.[17]

Second, the Joint Commenters' most recent on-net building data confirms that there is little intramodal, facilities-based competition in the business market in the Phoenix MSA. In particular, due to the real-world obstacles to self-deployment, Integra had constructed loop facilities to only **[***BEGIN HIGHLY CONFIDENTIAL**\]** **[***END HIGHLY CONFIDENTIAL**\]** buildings in the Phoenix MSA as of April 27, 2010. Thus, the number of buildings in the Phoenix MSA to which Integra has constructed loops has not changed since August 21, 2009, the vintage of the data previously submitted in the record by Integra.[18]

In addition, as explained in the Joint Commenters' April 28, 2010 Ex Parte Filing, as of the end of the first quarter of 2010, tw telecom had constructed loops to only **[***BEGIN HIGHLY CONFIDENTIAL**\]** **[***END HIGHLY**

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at 6-7 (explaining that the ACC's data shows that there are no significant alternative wholesale providers of loops and transport in the Phoenix MSA).

[17] *See also* Joint Commenters' Opposition, Attachment D, Fisher Declaration ¶ 13 (providing Integra's cable churn data for the January 2009 to July 2009 period).

[18] *See* Joint Commenters' Opposition, Attachment B, Bennett Declaration ¶ 6.

CONFIDENTIAL*]** and, as a result, its market penetration has not changed significantly since July 2009, the vintage of the data previously submitted by tw telecom.[19]

Third, in Integra's experience, Cox is still not a viable alternative to Qwest for the wholesale loops needed to serve Integra's business customers in the Phoenix MSA. As previously explained by Integra, due to several factors (e.g., the relatively limited number of buildings served by Cox's fiber loop facilities and the serious limitations of Cox's wholesale OSS capabilities),[20] "Integra ha[d] submitted **[***BEGIN HIGHLY CONFIDENTIAL***] [***END HIGHLY CONFIDENTIAL***]** Cox in Phoenix" as of September 21, 2009.[21] This figure remains unchanged.

Fourth, the latest information available to Integra confirms that Qwest faces only limited competition in the provision of wholesale transport facilities in the Phoenix MSA. Specifically, Integra previously submitted in the record tables listing the Phoenix MSA central offices in which Qwest is the only wholesale transport provider and the Phoenix MSA central offices in which Qwest is not the only wholesale transport provider.[22] Integra has found that this information remains unchanged.

Finally, as described in the attached Declaration of Douglas K. Denney, Integra's Director of Costs and Policy, cost studies recently conducted by Integra demonstrate that, if forbearance is granted, Integra would be forced to purchase loops and transport from Qwest as special access (or in the case of 2-wire loops, at the "commercial" rate offered by Qwest),

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[19] *See* Joint Commenters' April 28, 2010 Ex Parte Filing at 5.

[20] *See* Joint Commenters' Opposition, Attachment D, Fisher Declaration ¶¶ 7-8.

[21] *Id.* ¶ 9.

[22] *See id.* ¶ 11 & Exhibits 1-2.

thereby significantly increasing Integra's costs and placing Integra in a price squeeze.[23] Integra has concluded that, as a result, "Integra would not be able to profitably serve customers in the market for DS1-EEL-based services," "Integra would likely be priced squeezed out of the market for 2-wire loop-based services," and it would be "difficult for Integra to justify continuing to offer DS1 loop-based services."[24]

III. CONCLUSION

For the foregoing reasons and those discussed in the Joint Commenters' Opposition and April 28, 2010 Ex Parte Filing, the Commission should deny Qwest's Petition.

Respectfully submitted,

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(202) 303-1000

Attorneys for Integra Telecom, Inc., tw telecom inc., Cbeyond, Inc., and One Communications Corp.

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[23] *See generally* Declaration of Douglas K. Denney on Behalf of Integra Telecom, Inc. (dated Apr. 28, 2010) (attached hereto as Attachment D).

[24] *See id.* ¶¶ 6, 8-9.

ATTACHMENT A

REDACTED - FOR PUBLIC INSPECTION

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VIA ECFS

ERRATUM

September 21, 2009

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW, Suite TW-A325
Washington, DC 20554

Re: WC Docket No. 06-172, WC Docket No. 07-97

Dear Ms. Dortch:

Earlier today, comments were filed in the above-referenced dockets on behalf of Cbeyond, Inc., Integra Telecom, Inc., One Communications Corp. and tw telecom inc. Those comments lacked a table of contents. The revised version, enclosed below, contains a table of contents. A non-substantive formatting change to the caption is also reflected in the revised version.

Please let us know if you have any questions or concerns in connection with this filing.

Respectfully submitted,

/s/ Jonathan Lechter
Jonathan Lechter

Attachment

REDACTED - FOR PUBLIC INSPECTION

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

In the Matters of	)	
	)	
Petitions of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach Metropolitan Statistical Areas	)	WC Dkt. No. 06-172
Petitions of the Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas	)	WC Dkt. No. 07-97

COMMENTS OF CBEYOND, INTEGRA, ONE COMMUNICATIONS AND TW TELECOM

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September 21, 2009

TABLE OF CONTENTS

I. INTRODUCTION AND SUMMARY. 1

II. BACKGROUND. 5

III. THE FCC SHOULD ADOPT A STANDARD UNDER WHICH FORBEARANCE IS DENIED UNLESS FACILITIES-BASED COMPETITION IS SUFFICIENT TO PREVENT THE EXERCISE OF MARKET POWER. 8

A. The FCC Should Define Product Markets Based On A Careful Analysis Of Customer Demand Patterns. 10

B. The FCC Should Utilize MSAs As The Relevant Geographic Area For Purposes of UNE Forbearance. 16

C. The FCC Should Assess The Level Of Competition By Either Applying The Competitors' Proposed Standard Or By Conducting A Competition Analysis. 17

1. The Competitors' Proposed Standard. 17

2. Competition Analysis. 20

IV. THE FCC SHOULD APPLY ITS NEW STANDARD OF REVIEW TO THE EXISTING FACTUAL RECORD. 32

V. CONCLUSION 35

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

In the Matters of	)	
	)	
Petitions of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach Metropolitan Statistical Areas	)	WC Dkt. No. 06-172
Petitions of the Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas	)	WC Dkt. No. 07-97

COMMENTS OF CBEYOND, INTEGRA, ONE COMMUNICATIONS AND TW TELECOM

Cbeyond, Inc., Integra Telecom, Inc., One Communications Corp. and tw telecom inc. (collectively, "Joint Commenters"), by their attorneys, hereby file these comments in response to the August 20, 2009 Public Notice in the above-referenced dockets.[1]

I. INTRODUCTION AND SUMMARY.

Section 10 of the Communications Act states that the FCC shall forbear from a statutory requirement or a rule where the legal requirement in question is unnecessary to ensure that the rates, terms and conditions of service are just, reasonable and not unjustly or unreasonably discriminatory, where the legal requirement is unnecessary to protect consumers and where forbearance is otherwise in the public interest. Thus, the

[1] *Wireline Competition Bureau Seeks Comment On Remands Of* Verizon 6 MSA Forbearance Order *and* Qwest 4 MSA Order, Public Notice, DA 09-1835, WC Docket Nos. 06-172, 07-97 (rel. Aug. 20, 2009).

touchstone of the forbearance standard is ensuring that customers of telecommunications services are protected from harmful conduct by service providers. In the case of economic regulation, such as unbundling requirements, the legal requirements in question are designed to protect consumers against the abuse of market power by incumbent LECs in the form of prices set far above cost, degraded service quality and foregone innovation.

Accordingly, the FCC should review incumbent LEC petitions for forbearance from unbundling requirements ("UNE forbearance petitions") by applying established principles of economic analysis in order to determine if facilities-based competition is sufficient to yield competitive market outcomes. Unfortunately, the FCC has not done this in the past. Beginning with the order largely granting Qwest's petition for forbearance in Omaha and in all of the subsequent orders addressing UNE forbearance petitions, the FCC analyzed competition without properly defining product markets, without properly assessing the likelihood of future entry, and without assessing impact of a duopoly market structure on consumer welfare. These basic flaws in the applicable standard have yielded flawed decisions. For example, the Commission granted Qwest's petition for forbearance in Omaha based on an unfounded prediction that competition would constrain Qwest's exercise of market power in the wholesale market. Unsurprisingly, that prediction has not come true, causing McLeodUSA, which served end users via Qwest loop facilities, to largely abandon the market.

This remand proceeding offers the Commission an opportunity to avoid such flawed decision making in the future. In its decision overturning the *6-MSA Order*, the D.C. Circuit emphasized that Congress did not mandate any particular mode of analysis for the Commission under Section 10. The FCC is therefore free to adopt an approach that makes sense in light of the overall policy objectives of Section 10. The Commission

should use this freedom to abandon its past approach in favor of a standard of review that is firmly rooted in basic principles of competition policy. It should begin by properly defining product markets based on customer demand patterns in accordance with principles set forth in the FTC-DOJ Horizontal Merger Guidelines. Among other things, the FCC must establish separate product market definitions in the wholesale and retail markets and for business and residential services. In addition, the Commission should adopt a sensible geographic area in which to analyze competition. Metropolitan Statistical Areas ("MSAs") are suitable because they reflect the area that UNE-based competitors must generally serve in order to achieve profitability and serve a community of interest in an urban area.

The Commission should then assess the level of competition faced by the incumbent in the relevant product markets within the MSA in which forbearance has been sought. It could do so by utilizing the test that the Joint Commenters and other competitors have proposed ("Proposed Standard"). Under the Proposed Standard, forbearance would only be granted where the incumbent LEC faces competition in the relevant market from at least two competitors that have deployed their own loops to 75 percent of the relevant end user locations and where at least two competitors that offer service via their own loops have each garnered at least 15 percent of the market in the relevant product market. The Commission could use this standard as a bright line test or as a presumption, under which MSAs that meet the criteria in the test are presumed to be eligible for forbearance whereas MSAs that do not meet the criteria are presumed to be ineligible for forbearance.

Alternatively, the Commission could assess the level of competition in the relevant market in an MSA by undertaking a market competition analysis informed by

the FTC-DOJ Horizontal Merger Guidelines. Under this approach, forbearance should only be granted in a market where the analysis yields the conclusion that facilities-based competition is sufficient to prevent the incumbent LEC from exercising market power unilaterally or as a result of coordinated conduct. The Guidelines provide a framework for analyzing both potential entry and actual competition. Under the Guidelines, a potential entrant is only considered as part of the competition analysis if such firm's entry is likely, timely (i.e., it will occur within two years) and sufficient (i.e., the competitor's entry will be sufficient in scope and market influence to have a constraining effect on the incumbent's prices). It is extremely unlikely that a prospective entrant into the market at issue in UNE forbearance proceedings would meet the Guideline's criteria for potential entry. The FCC should therefore presume that only actual competition is relevant to the competition analysis.

As to actual competition, the Commission should only account for competitors to the extent that they have deployed their own loop facilities to end user locations in the relevant market and that they have achieved significant market share. The Commission must also determine the number of such non-incumbents, in all events at least two, necessary to constrain the incumbent LEC's exercise of market power. By following these basic principles, the Commission can ensure that forbearance will not be granted prematurely or denied where appropriate.

Finally, the Commission should apply the standard of review adopted in this proceeding to the existing factual record. The FCC is free to decline to re-open the record so long as the submission of new information would not change the outcome of the proceeding. That is the case here because (1) the FCC has the benefit of the substantial information submitted by parties right up to the conclusion of the 6-MSA and

4-MSA proceedings; (2) there is no basis for concluding that facilities-based competition could have progressed materially since the close of those records; (3) the evidence did not indicate that competition was even close to being sufficient to constrain the incumbents' exercise of market power in any product market in any MSA (this is true even for residential telephone service, if properly analyzed); and (4) the incumbents always have the opportunity to seek forbearance in the future in a market in which competition has in fact developed. In any event, if the Commission does re-open the record in this proceeding, it should do so *only* in a specific product market in a specific MSA in which the available evidence indicates that facilities-based competition is sufficient to yield competitive outcomes.

II. BACKGROUND.

In the underlying agency proceedings that led to the *6-MSA Order*[2] and the *4-MSA Order*,[3] interested parties submitted extensive evidence regarding the level of facilities-based competition in the geographic areas at issue. For example, in the 6-MSA proceeding, the Joint Commenters submitted detailed information regarding the extent to which non-incumbent LECs, including the Joint Commenters themselves, and cable operators, have deployed loop and transport facilities in the six MSAs.[4] With few

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[2] *In re Petitions of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach Metropolitan Statistical Areas*, Memorandum Opinion and Order, 22 FCC Rcd. 21293 (2007) ("*6-MSA Order*"), *remanded*, *Verizon Tel. Cos. v. FCC*, 570 F.3d 294 (D.C. Cir. 2009) ("*Verizon*").

[3] *In re Petitions of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas*, Memorandum Opinion and Order, 23 FCC Rcd. 11729 (2008) ("*4-MSA Order*"), *remanded*, *Qwest Corp. v. FCC*, No. 08-1257 (D.C. Cir. Aug. 5, 2009).

[4] *See, e.g.*, Opposition of Time Warner Telecom Inc., Cbeyond Inc., and One Communications Corp., WC Dkt. No. 06-172 at 20-26 (filed Mar. 5, 2007) (describing

exceptions, the incumbent cable operators in the six MSAs submitted extremely detailed information regarding their network deployment.[5] In its petition, reply comments and other filings, Verizon also submitted information regarding the state of competition in the six MSAs.[6] If anything, the record in the 4-MSA proceeding was even more robust.[7] In both proceedings, the FCC examined the record closely and determined in the *6-MSA Order* and the *4-MSA Order* that there was insufficient competition to justify forbearance.

Verizon appealed the *6-MSA Order* and Qwest appealed the *4-MSA Order*. While these appeals were pending, on February 14, 2008 and March 31, 2008, Verizon re-filed petitions for forbearance from unbundling obligations in two of the six markets in which it had sought forbearance in the 6-MSA proceeding (Virginia Beach and Rhode Island),[8]

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network deployment of CLECs); *id.* at 39-46 (describing limitations of cable network facilities); Ex Parte Letter from Brett Heather Freedson, Counsel, XO Communications, LLC, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 06-172 (filed Nov. 8, 2007) (describing the extent to which XO and other competitors had deployed loop facilities to commercial buildings in the six MSAs).

[5] *See 6-MSA Order* n.71 (listing *ex parte* filings by cable operators).

[6] *See, e.g.,* Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston Metropolitan Statistical Area, WC Dkt. No. 06-172 (filed Sept. 6, 2006); Reply Comments of Verizon Telephone Companies, WC Dkt. No. 06-172 (filed Apr. 18, 2007).

[7] *See, e.g.*, Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Colorado Metropolitan Statistical Area, WC Dkt. No. 07-97 (filed Apr. 27, 2007); Erratum to Opposition of Time Warner Telecom Inc., Cbeyond Inc., and Eschelon Telecom Inc., WC Dkt. No. 07-97 (filed Sept. 13, 2007); Letter from J.G. Harrington, Counsel, Cox Communications, Inc. to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 07-97 (filed June 17, 2008) (describing Cox network coverage in Phoenix); *4-MSA Order* n.134 (listing ex parte filings by CLECs describing their network coverage).

[8] These two re-filed petitions covered slightly different geographic areas than the two corresponding petitions in the 6-MSA proceeding. In the 6-MSA proceeding, Verizon had sought forbearance from unbundling requirements in the Providence MSA, which includes all of Rhode Island and parts of Massachusetts, and in the Virginia Beach MSA,

and, on March 24, 2009, Qwest re-filed a petition for the Phoenix MSA, one of the four markets in which it sought forbearance in the 4-MSA proceeding.[9] Apparently because it was concerned that the FCC would likely deny both its Virginia Beach and Rhode Island petitions in a single order, on May 12, 2009, Verizon withdrew both petitions just three days before the statutory deadline for the FCC to rule on the Rhode Island petition.[10] Qwest's Phoenix petition remains pending and was recently docketed by the Commission.[11]

On June 19, 2009, the D.C. Circuit released its opinion in the appeal of the *6-MSA Order*. The court reached two main holdings. First, it rejected Verizon's argument that the FCC must forbear from unbundling obligations where competitors are unimpaired under Section 251(d)(2) and have the theoretical "ability" to compete in the absence of unbundling requirements.[12] Instead, the court held that the FCC need only review petitions for forbearance from unbundling pursuant to the standard set forth in Section 10.[13] That provision only requires that the FCC forbear where (1) enforcement of a

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which includes some areas in which Cox is the incumbent cable company and some areas in which Cox is not the incumbent cable company. In the re-filed petitions, Verizon sought forbearance in Rhode Island only and in only those parts of the Virginia Beach MSA in which Cox is the incumbent cable company.

[9] *See* Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area, WC Dkt. No. 09-135 (filed Mar. 24, 2009).

[10] *See* Ex Parte Letter from Dee May, Vice President, Federal Regulatory, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Dkt. Nos. 08-24, 08-49 (filed May 12, 2009).

[11] *See Pleading Cycle Established for Comments on Qwest Corporation's Petition for Forbearance in the Phoenix, Arizona Metropolitan Statistical Area*, Public Notice, DA 09-1653, WC Dkt. No. 09-135 (rel. July 29, 2009).

[12] *Verizon*, 570 F.3d at 300-01.

[13] *See id.*

requirement is not necessary to ensure that rates are just, reasonable and non-discriminatory; (2) enforcement is not necessary to protect consumers; and (3) grant of forbearance is consistent with the public interest.[14]

Second, the court held that, in applying the Section 10 standard, the FCC had failed to explain why it considered only actual competition (i.e., competitors' market share) in the *6-MSA Order* whereas, in prior UNE forbearance orders, it had considered both actual and potential competition. The court therefore remanded the *6- MSA Order* to the FCC. In doing so, it emphasized that "Congress did not prescribe a 'particular mode of market analysis'" in Section 10, that in future proceedings it "may be reasonable" for the FCC to consider an incumbent LEC's possession of a particular market share "as a key factor in the agency's determination that a marketplace is not sufficiently competitive" and that it "may also be reasonable for the FCC to consider only evidence of actual competition rather than actual and potential competition."[15] This same guidance now applies to the remand of the *4-MSA Order*, which the D.C. Circuit issued in response to the FCC's request for a voluntary remand of that order after the court's release of the *Verizon* decision.

III. THE FCC SHOULD ADOPT A STANDARD UNDER WHICH FORBEARANCE IS DENIED UNLESS FACILITIES-BASED COMPETITION IS SUFFICIENT TO PREVENT THE EXERCISE OF MARKET POWER.

As the Joint Commenters have explained numerous times in these and other proceedings, the standards applied by the Commission for reviewing UNE forbearance petitions in the past have been fatally flawed. Most obviously, the FCC has failed to

[14] 47 U.S.C. § 160(a).

[15] *Verizon*, 570 F.3d at 304.

define product markets correctly, relied on future entry without seriously assessing the reliability of such predictions, and failed to account for the harms caused by duopolistic markets. These flaws inevitably led to bad policy outcomes. Most obviously, in the *Omaha Order*, the Commission granted Qwest forbearance from unbundling requirements based on its prediction that retail competition would constrain Qwest's exercise of market power in the wholesale market in Omaha, something that appears not to have occurred. As a result, McLeodUSA has largely abandoned the Omaha market, and consumers have suffered the consequences of diminished competition.[16] Moreover, if the FCC were to continue to apply a standard similar to the one it has applied in the past, it would likely make other, similar errors.

Thus, in considering the remand of the *6-MSA Order* and the *4-MSA Order*, the FCC must abandon its past approach to UNE forbearance petitions and adopt a new standard of review that is rooted in sound principles of market analysis. The Commission's analysis must begin by defining relevant product markets based on customer demand patterns and by utilizing an appropriate geographic area. The Commission should then assess the level of competition within the relevant market by applying the standard of review proposed by the Joint Commenters and other competitors or by undertaking a market power analysis. Either way, it is critical that the FCC deny forbearance unless the incumbent LEC faces a sufficient level of actual competition in a relevant market to discipline the rates, terms and conditions under which the incumbent LEC offers service.

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[16] *See* Letter from Brett P. Ferenchak, Counsel, McLeodUSA d/b/a Paetec, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 02-33 (filed June 11, 2009) (enclosing notice of discontinuance for Omaha MSA).